Supreme Court, U.S.
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In The
Supreme Court of the United States

Alfredo Roman-Roman, *Petitioner*

v.

United States of America, *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

Petitioner entered a conditional plea of guilty of conspiracy to possess with intent to distribute methamphetamine, reserving his right to appeal the district court's denial of his motion to suppress evidence. The U.S. Court of Appeal for the Tenth Circuit affirmed the district court's denial of the motion.

1.) Whether a reviewing court must consider defendant's ability to speak English in determining whether consent is valid under the totality of circumstances test of the Fourth Amendment when petitioner's inability to speak English is fairly presented by the evidence but trial counsel does not point it out at the suppression hearing?

2.) Whether petitioner's consent was obtained during an illegal detention.

3.) Whether a vehicle search is beyond the scope of consent when a State Trooper merely asks to "take a look" and instead removes the molding and side panels of the vehicle after deliberately placing petitioner in a position wherein he cannot observe the search?

4.) Whether this case should be remanded for re-sentencing in light of this Court's recent decision in Booker/Fan-Fan?

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Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Tenth Circuit because the Court of Appeals did not consider petitioner's inability to speak English in determining whether his consent was valid under the Fourth Amendment. This Court should also decide whether general consent to search a vehicle includes removing the molding and rear side panels of the interior when a suspect lacks a meaningful opportunity to object.

Opinions Below

The opinion of the United States District Court for the District of Kansas (App. at 14) is not reported in F.Supp. 2d but can be found at 2002 WL 31928487 (D.Kan.) The opinion of the Court of Appeals (App. at 26) is reported at 116 Fed.Appx. 994, 2004 WL 27866119.

Jurisdiction

The judgment of the United States Court of Appeal for the Tenth Circuit was entered December 6, 2004. (App. at 26). A petition for rehearing was denied on January 10, 2005. (App. at 33). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the U.S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing th place

to be searched, and the persons or things to be seized." U.S. Const.Amend.4

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const.Amend.6

Statement of the Case

Petitioner appealed the judgment of the District Court for the District of Kansas following the denial of his motion to suppress evidence. Petitioner contended that the search was unlawful because it was accomplished without his voluntary consent. Petitioner also argued the search exceeded the scope of consent. The United States District Court for the District of Kansas had jurisdiction pursuant to 18 U.S.C. §3231.

On October 17,2002, at approximately 10:20 a.m., Kansas State Trooper Andrew Dean was on routine patrol in Geary County, Kansas, on Interstate 70 when he observed a blue Chrysler mini-van move from the passing lane into the other eastbound lane in front of another vehicle. Trooper Dean determined that the mini-van had done so without a safe distance between the two vehicles, and had failed to maintain a single lane. Accordingly, Trooper Dean stopped the mini-van.

The following sequence of events is taken from the videotape of the search and seizure which was entered into

evidence in the District Court and made part of the record on appeal.

After being pulled over Trooper Dean told petitioner and Ms. Florez the purpose of the stop and stated he wanted to make sure they were not too tired to drive. Trooper Dean then asked for Ms. Florez's driver's license and where they were coming from. Ms. Florez responded that they were coming from California. Trooper Dean asked where in California and where they were going to. Ms. Florez responded that they were headed to Alabama in a car rented by petitioner and also indicated that petitioner does not speak English. Trooper Dean then asked for petitioner's driver's license and asked where in Alabama they were staying and if they were married. Trooper Dean also asked how long they were going to stay in Alabama and whether they were seeing family. This exchange was not translated to petitioner by Ms. Florez.

Finally Trooper Dean went back to his vehicle and approximately five minutes later returned to the mini-van. After reviewing the documents, but before returning them to the occupants, Trooper Dean asked why they were taking the I-70 instead of the I-40. Ms. Florez translated the question to petitioner. Trooper Dean then asked Ms. Florez to ask petitioner if he got lost. Ms. Florez translated the question to petitioner who answered in Spanish. Ms. Florez then translated petitioner's answer into English for Trooper Dean. Trooper Dean also asked if it was petitioner's family they were going to see.

Trooper Dean returned the documentation and said they were free to leave but asked if they would mind answering a few more questions before they got going. Ms. Florez did not translate the forgoing statements to petitioner and only Ms. Florez indicated that she did not mind. Trooper Dean then asked if there were any drugs or guns in the car. This question also was not translated to petitioner

and only Ms. Florez responded by saying no. Trooper Dean then asked if they would mind if he "takes a look." Again, the question is not translated by Ms. Florez. Trooper Dean testified that Ms. Florez looked to Mr. Roman-Roman and then she said "OK, Sure."

Trooper Dean asked the occupants to step out of the vehicle and moved petitioner to the front of the right hand side of the vehicle. He testified that he then told petitioner to stay there. Mr. Roman-Roman remained in this position during the entire search. The audio was shut off during the first two thirds of the search.

The videotape shows that when Trooper Dean asked the occupants to step out of the vehicle petitioner did not respond. As a result, Trooper Dean asked Ms. Florez to tell petitioner to step out. Ms. Florez complied and petitioner exited the vehicle from the passenger side. Trooper Dean led petitioner with his hand to the front right passenger side of the vehicle while telling him to keep moving forward. Once petitioner was placed in a position where he could not have observed the search, he was told to stand where he was.

Six minutes into the search Trooper Dean's supervisor noticed that some molding was loose in the vehicle. After drugs were discovered, one of the Troopers said that petitioner does not speak English, to which the other Trooper responds, "That's okay, I do."

Trooper Dean testified that he thought petitioner understood some English. However, his affidavit says that petitioner did not speak English and the parties agreed in the factual basis of the plea agreement that petitioner apparently did not speak English. (App. at 35-41).

Reasons for Granting the Petition

I. A United States Court of Appeals has decided an

important constitutional question by limiting its factual inquiry in a way that conflicts with this Court's ruling that consent to search under the Fourth Amendment must be determined from the totality of circumstances.

This Court has long held that whether consent to search is voluntary is a question of fact to be determined by the totality of circumstances *Schneckloth v. Butamonte* 412 U.S. 218, 93 S.Ct. 2041, 2047-8. (1973). Consent is not voluntary when it is the product of duress or coercion, express or implied. *Id.* This Court has also insisted that totality of circumstance review must be broad. *Blackburn v. State of Alabama* 361 U.S. 199, 80 S.Ct. 274 (1960).

This Court has routinely considered *all of the surrounding circumstances,* including the characteristics of the accused and the details of the interrogation, in determining whether a defendant's will was overborne in a particular case. *Bustamonte,* supra, 93 S.Ct. at 2047. Some of the factors taken into account include the youth of the accused; *Haley v. Ohio,* 332 U.S. 596, 68 S.Ct. 302 (1948); lack of education; *Payne v. Arkansas,* 356 U.S. 560, 78 S.Ct 844 (1958); low intelligence; *Fikes v. Alabama* 352 U.S. 191, 77 S.Ct 281(1959); the lack of any advice to the accused of his constitutional rights; *Davis v. North Carolina* 384 U.S. 737, 86 S.Ct 1761 (1966); the length of detention; *Chambers v. Florida* 309 U.S. 227, 60 S.Ct 472 (1940); and the repeated and prolonged nature of the questioning; *Ashcraft v. Tennessee* 322 U.S. 143, 64 S.Ct 921 (1944). Certainly a defendant's ability to speak English is an important factor and existing precedent requires the lower court to consider all relevant factors on appeal.

The Court of Appeals refused to consider petitioner's ability to speak English as a factor on the grounds that the issue was not raised at the suppression hearing in the district court. Petitioner's trial attorney argued that consent

was not valid because a reasonable person would not feel free to leave under the circumstances, and that the search was beyond the scope of consent. On appeal, petitioner asked the court to consider his inability to speak English as a factor which was overlooked by the district court and petitioner's trial attorney. The Court of Appeals erroneously ruled that petitioner's inability to speak English was a new issue, rather than a factor it must consider under the Fourth Amendment.

The Court of Appeals ruling is contrary to binding precedent. Petitioner's understanding of the English language (if not a factor that must be considered) is a predicate to the intelligent resolution of the questions presented at the suppression hearing, and therefore it cannot be said that petitioner waived his right to make the argument on appeal. In addition, such a ruling places petitioner's conditional plea into question since he explicitly reserved his right to appeal the district court's denial of the suppression motion.

This Court has ruled in two cases that the scope of review on the issue of involuntariness is not restricted to the information available to the trial court at the time it renders its ruling. In *Blackburn*, supra 80 S. Ct. at 281-281 this Court rejected respondent's argument that trial counsel was obligated to request reconsideration of a suppression motion after additional data showed that defendant was mentally ill. Likewise, in *Brown v. State of Mississippi* 297 U.S. 278, 56 S.Ct. 461 (1936) this Court said defense counsel was not obligated to renew his suppression motion after proving coercion because the trial court was fully advised of the undisputed evidence of the way in which the confessions were procured.

In this case, the record evidence clearly demonstrates that petitioner is not fluent in English and that crucial portions of the exchange were not translated to him. The

evidence is beyond dispute since the entire search was videotaped and entered into evidence. In addition, petitioner needed the assistance of an interpreter throughout the proceedings. Thus, the trial court was fully aware that petitioner was not fluent in English and should have considered it.

In refusing to consider petitioner's inability to speak English the Court of Appeals made reference in a footnote to Trooper Dean's testimony that he thought petitioner understood some English because he responded to questions and instructions given exclusively in English. (App. at 30-31). However, the videotape of the incident contradicts Trooper Dean's testimony. In addition, Trooper Dean's testimony contradicts his own affidavit of probable cause to arrest petitioner wherein he states "The passenger was unable to speak English..." (App. at 40). Trooper Dean also notes that Ms. Florez translated parts of the conversation and petitioner replied in Spanish. *Id.*

The Court of Appeals decision is based solely on trial counsel's failure to explicitly point out that petitioner's inability to speak English should be considered. In *Brown*, because the trial court was fully aware of the way in which the confession was procured this Court said: "We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient." *Id.* at 210. Moreover, there are numerous cases wherein this Court has overruled lower court decisions for failure to consider the totality of circumstances. Once counsel argued that petitioner's consent was not voluntary because a reasonable person under the circumstances would not feel free to leave, and the evidence plainly demonstrates that petitioner is not fluent in English, the trial court had a duty to consider it despite counsel's shortcomings.

At least one circuit has ruled that the government's

burden of proving that consent is freely given is heavier when it appears that a defendant is illiterate or a foreigner who does not readily speak English. *Kovach v. United States*, 53 F.2d 639 (6th Cir. 1931). Since it is more than apparent that petitioner does not speak English and the videotape reveals that the officers were aware of that fact (i.e. Ms. Florez told the Troopers that petitioner did not speak English; she translated portions of the exchange; one of the Troopers acknowledged that petitioner did not speak English on the videotape and in his affidavit; and the factual basis of the plea agreement states that it appeared petitioner did not speak English), it was incumbent upon the government to show that petitioner understood that he was free to leave even though he did not speak English and they did not direct Ms. Florez to translate their request to take a look.

Moreover, the Court of Appeals ignored the government's responsive brief which relied almost exclusively on the consent of Ms. Florez. The government never contended that petitioner waived his right to argue that a reasonable person in his circumstance would not feel free to leave in light of the fact that he does not speak English. Indeed, the parties agreed in the factual basis for the guilty plea that petitioner "was apparently unable to speak English." (App. at 31). It should also be noted that the Court of Appeals declined to remand the case or review for plain error. This is particularly disturbing since the same circuit has previously remanded cases at the government's request when the trial court held that defendant's detention was illegal but did not consider the issue of consent. *United States v. Walker*, 933 F.2d 812 (10th Cir.1991) [case remanded for further factual findings on the issue of voluntariness].

The Court of Appeals refusal to consider the petitioner's inability to speak English coupled with the refusal to review for plain error, or to remand for a factual

determination, multiplies the burdens of the federal court system by requiring petitioner to begin again on habeas corpus. This is contrary to the purpose of Federal Rule of Criminal Procedure 11(a)2 which provides for a conditional guilty plea for purposes of judicial economy. When an issue is exposed on appeal it should be resolved. Particularly where review is de novo and the court is required to look at the totality of circumstances.

II. The Court of Appeals decision that petitioner was not illegally detained conflicts with this Court's ruling that a seizure which is lawful at its inception can become unlawful if it is prolonged beyond the time reasonable to complete the mission.

This Court has held that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *United States v. Jacobsen,* 466 U.S. 109, 124, 104 S.Ct. 1652 (1984). A seizure that is justified solely by the interest of issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete the mission. *Illinois v. Caballes,* 125 S. Ct. 834 (2005).

In this case petitioner was pulled over after state Troopers observed his mini-van cut too closely in front of another vehicle and failed to maintain a single lane. After being pulled over Trooper Dean told petitioner and Ms. Florez the purpose of the stop and stated he wanted to make sure they were not too tired to drive. Trooper Dean then asked for Ms. Florez's driver's license and where they were coming from. Ms. Florez responded that they were coming from California. Trooper Dean asked where in California and where they were going to. Ms. Florez responded that they were headed to Alabama in a car

rented by petitioner. Trooper Dean then asked for petitioner's driver's license and asked where in Alabama they were staying and if they were married. Trooper Dean also asked how long they were going to stay in Alabama and whether they were seeing family. This exchange was not translated for petitioner by Ms. Florez.

Finally Trooper Dean went back to his vehicle and approximately five minutes later returned to the mini-van. After reviewing the documents, but before returning them to the occupants, Trooper Dean asked why they were taking the I-70 instead of the I-40. Ms. Florez, translated the question to petitioner. Trooper Dean then asked Ms. Florez to ask petitioner if he got lost. Ms. Florez translated the question to petitioner who answered in Spanish. Ms. Florez then translated petitioner's answer into English for Trooper Dean. Trooper Dean also asked if it was petitioner's family they were going to see.

Trooper Dean returned the documentation, including a warning citation, and said they were free to leave but asked if they would mind answering a few more questions before they got going. Ms. Florez did not translate the forgoing statements to petitioner and only Ms. Florez indicated that she did not mind. Trooper Dean then asked if there were any drugs or guns in the car. This question also was not translated to petitioner and only Ms. Florez responded by saying no. Trooper Dean then asked if they would mind if he "takes a look." Again, the question is not translated by Ms. Florez.

The seizure in this case was justified solely by the interest in issuing a warning ticket which was unreasonably prolonged by the Trooper's obvious fishing expedition. Consent that is obtained during an illegal detention is ordinarily ineffective to justify an otherwise invalid search. *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319 (1983). The detention and questioning went beyond what was

reasonably required to issue a warning ticket.

III. This Court should settle the question as to whether general consent to search a vehicle includes removing the interior molding and paneling when a defendant lacks a meaningful opportunity to object.

This Court has held that general consent to search a vehicle for drugs includes consent to search containers within the vehicle. *Florida* v. *Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 251 (1991). However, this Court has not decided whether *Jimeno* extends to removing the molding and paneling of a vehicles interior but has said that "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk..." *Id.* at 252.

The 11th Circuit has held that a defendant's consent to search a vehicle does not include permission to slash a spare tire. *United States v. Strickland*, 902 F.2d 937 (11th Cir. 1990). The 7th Circuit has held that general consent does not give officers authority to dismantle a vehicle's interior by removing the panels during an otherwise valid search unless they have probable cause. *United States v. Garcia*, 897 F.2d 1413, 1419-1420 (1990).

This case was decided in the 10th Circuit which does not allow destruction of property but recognizes that partial disassembly of the interior may be justifiable when there is general consent and no subsequent objection is made. *United States v. Osage*, 235 F.3d 518 (10th Cir.2000); *United States v. McRae*, 81 F.3d, 1537-38 (10th Cir.1996). This Court should decide whether *Jimeno* extends to dismantling of a vehicle's interior.

Moreover, assuming that *Jimeno* does extend to dismantling a vehicle's interior, this Court should decide whether it violates the Fourth Amendment when officers

conduct such an extended search outside of the defendant's field of vision. In *Jimeno* this Court has said that "A suspect may of course delimit as he chooses the scope of the search to which he consents." *Id.* at 252. The 1st Circuit has held that a defendant's failure to object does not expand the scope of his consent when he is not present throughout the search and therefore lacks a meaningful opportunity to delimit the search. *United States v. Turner*, 169 F.3d 84 (1st Cir.1999).

In this case, after Ms. Florez agreed that Trooper Dean could "take a look", Trooper Dean asked the occupants to step out of the vehicle. Because petitioner did not respond, Trooper Dean asked Ms. Florez to tell petitioner to step out. Ms. Florez complied and petitioner exited the vehicle from the passenger side. Tropper Dean led petitioner with his hand to the front right passenger side of the vehicle while telling him to keep moving forward. Once petitioner was placed in a position where he could not have observed the search he was told to stand where he was.

The videotape shows that petitioner was placed in a position where he could not possibly observe the Troopers ripping apart the paneling of the rear side of the mini-van. Thus, even if petitioner's consent to "take a look" would give authorities permission to search every nook and cranny of the vehicle for approximately eight minutes, the Court of Appeals holding that consent was unrestricted because petitioner did not object is at odds with other circuits and with this Court's recognition that the Fourth Amendment gives an individual the right to limit the scope of his consent.

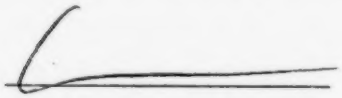
IV. This case should be remanded for resentencing in light of this Court's recent decision in Booker/Fan-fan.

This Court has recently held that the Federal Sentencing Guidelines are not mandatory and that the Court's opinion must be applied to all cases on direct review. *Unites States v. Booker*, 125 S.Ct. 738 (2005). While this issue was not raised below, this Court has frequently allowed parties to raise issues for the first time on appeal when there has been a significant change in the law since the trial. *Standard Industries, Inc. v. Tigrett Industries, Inc.*, 397 U.S. 586, 90 S.Ct. 1310.

Conclusion

Petitioner requests that the Court grant certiorari and 1) decide the case on the merits or 2) remand to the lower court for consideration of the issues raised.

Respectfully submitted,



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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

Vs. Case No. 02-40127-01-SAC

ALFREDO ROMAN-ROMAN,

Defendant.

MEMORANDUM AND ORDER

This case comes before the court on defendant Alfredo Roman-Roman's application and suggestions in support to suppress evidence. (Dk. 18). The government opposes the motion. Having reviewed the pleadings and evidence admitted at the evidentiary hearing held on December 12, 2002, the court issues this order.

Facts

The facts are few and undisputed. On October 17, 2002 at approximately 10:20 a.m., Kansas State Trooper Andrew Dean was on routine patrol in Geary County, Kansas on Interstate 70 when he observed a blue Chrysler mini-van move from the passing lane into the other eastbound lane in front of another vehicle. Trooper Dean determined that the mini-van had done so without a safe distance between the two vehicles, and had then failed to maintain a single lane. Accordingly, Trooper Dean stopped the mini-van. Defendant does not contest the legality of the initial stop.

After stopping the mini-van, Trooper Dean approached the passenger side of the vehicle and spoke to the driver, who was identified by her California driver's license as Rosa Florez. Trooper Dean advised her of the purpose of the stop, and asked for relevant documentation. Ms. Florez advised that she was driving a rental vehicle, and in response to Trooper Dean's questions, told him that she and her passenger, Alfredo Roman-Roman, were traveling from California to Alabama to visit friends or

family. She also stated that the passenger, who was also identified by his California driver's license, did not speak English.

The requested documentation was then produced, including a rental agreement showing that the mini-van had been rented by Alfredo Roman-Roman in Los Angeles, California two days earlier. Trooper Dean noticed that both adults appeared to be "very nervous," and that two small children were in the vehicle.

After returning to his vehicle, review the documents, receiving criminal history reports, and preparing the warning citation, Trooper Dean returned to the van and asked the occupants why they had taken I-70 rather than I-40, which he knew to be a more direct route between Los Angeles and Alabama. Ms. Florez replied that Mr. Roman-Roman had been driving, and translated the question to him. He replied that this was the route "they" had told him to take. Trooper Dean then returned the documentation to the driver and gave them a warning citation for making an improper lane change and failing to maintain a single lane of traffic. He then advised them: "Well, you guys are free to go - thanks for your time, O.K.?"

Trooper Dean then immediately asked: "Do you mind if I ask you a couple more questions, though, before you get going?" Ms. Florez replied that she did not. Trooper Dean then asked: "you guys don't have any drugs or guns or anything in the car, do you?" to which Ms. Florez replied negatively. Trooper Dean then asked, "Do you mind if we take a look?" and both occupants indicated their consent to that request. Trooper Dean asked them to step out of the vehicle, which they did, removing the children as well.

During the subsequent search of the vehicle, Trooper Jimerson, Trooper Dean's supervisor who had been riding with him, noticed that where the molding met the roof line,

it was "curled up." Because the vehicle was new and a rental, he believed, based upon his experience[1], that someone had removed the molding and panel for purposes of concealing illegal substances or other contraband. He then removed the loose molding, pulled the back side panels out, and found approximately 69 pounds of methamphetamine wrapped in cellophane bundles hidden in the wall panels of the mini-van.

Legality of Detention

Defendant does not challenge either the legality of the initial stop or the legality of the detention preceding Trooper Dean's return of the driver's documents to her. Defendant's sole assertion in his brief is that the Trooper's detention of defendant beyond the purpose of the initial stop is illegal, and that his consent was not sufficiently attenuated from his illegal detention to have been given freely and voluntarily.

General Law - Scope of Detention

The Fourth Amendment protects individuals from unreasonable searches and seizures. *See* U.S. Const. Amend IV. An unconstitutional seizure may render an otherwise constitutional search invalid under the Fourth Amendment if the search resulted from the illegal seizure or detention. *United States V. Miller*, 84 F.3d 12444, 1250 (10th Cir.), *cert. denied*, 519 U.S. 985 (1996), *overruled on other grounds, United*

[1] Trooper Jimerson testified that in every case (numbering 10 to 20) in which he had seen evidence that the molding or paneling had been tampered with on rental cars, he had found drugs or drug money concealed behind the panels.

States v. Holland, 116 F.3d 1353, 1357-59 (10th Cir.), *cert. denied*, 522 U.S. 902, *overruled in part on other grounds, Bousley V. United States*, 523 U.S. 614 (1998).

As established by Supreme Court precedent, there are three general types of police-citizen encounters: "(1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, [which are] the most intrusive... and [are] reasonable only if supported by probable cause." *United States v. Davis*, 94 F.3d 1465, 1467-68 (10th Cir. 1996) (citations omitted).

If an encounter between a police officer and a motorist is consensual, the Fourth Amendment ban on unreasonable searches and seizures does not come into play. *See United States v. Walker*, 933 F.2d 812, 816-17 (10th Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992). "A consensual encounter is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer." *United States v. Hernandez*, 93 F.3d 1493 (10th Cir. 1996). Supreme Court precedent is clear "that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business, 'the encounter is consensual.' " *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19n. 16 (1968).

In deciding if a police-citizen encounter amounts to a seizure, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police

conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *United States v. Hill*, 199 F.3d 1143, 1147 (10th Cir. 1999) (quoting *Bostick*, 501 U.S. at 437), *cert. denied*, 121 S. Ct. 83 (2000). Put another way, "[a] person is seized only when that person has an objective reason to believe he or she is not free to end the conversation with the officer and proceed on his or her way." *United States v. Hernandez*, 93 F.3d at 1498 (citation omitted). No per se or absolute rules govern this inquiry. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996). "Rather, every case turns on the totality of the circumstances presented." *United States v. Little*, 18 F.3d 1499, 1503 (10th Cir. 1994).

Factors relevant to whether a reasonable person would not feel free to terminate the encounter with police include: the threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that the compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed place; and absence of other members of the public. *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996). No one factor is dispositive in this analysis. *United States v. Glass*, 128 F.3d 1398, 1406 (10th Cir. 1997).

Analysis

Defendant asserts that a reasonable person would not have felt free to disregard Trooper Dean's request because it was asked immediately after they were told they were free to go, and because it was phrased so as to tacitly

indicate that they were required to answer the questions before they left.

The court disagrees that Trooper Dean's choice of words would indicate to a reasonable person that compliance with his request to answer a few more questions was compulsory. Rather than indicating that they could not go until they answered a few more questions, Trooper Dean's question "mind answering a few questions before you get going?" reemphasized his previous statement that they were free to leave. Additionally, defendant has shown no reason why the fact that the question followed on the heels of Trooper Dean's statement that they were free to go, bears any weight in this analysis. No coercion has been shown.

It is undisputed that all the documents in the possession of the Trooper were returned before the questioning and delay which defendant challenges. The *Terry* detention ended when Trooper Dean handed the occupants the documents he had reviewed, and told them they were free to go. Although other factors could show a seizure after that point, none has been shown here. Accordingly, there is no factual basis for finding that defendant was illegally detained. Rather, the contact after Trooper Dean returned the documentation and told them they were free to go was the result of a consensual encounter.

General Law - Consent

In his brief, defendant asserted solely that his consent to search of the vehicle was involuntary because it was the product of an illegal detention. Given the court's rejection above of the illegal detention theory, this argument fails.

At the evidentiary hearing, defendant surprised the government by alleging that the search exceeded the scope of the consent. [2]As the court understand this new argument, defendant admits that he consented to the Trooper's "taking a look" in the vehicle, but denies that such consent extends to the Trooper's physical manipulation of the vehicle itself.

The court examines the totality of the circumstances to determine whether a search remains within the boundaries of the consent given. *United States v. Hooper*, 47 Fed. Appx. 531, 534, 2002 WL 1972407, *3 (10th Cir. Aug. 27, 2002).

> The general standard for measuring the scope of consent is based on "objective reasonableness." *United States v. Pena*, 143 F.3d 1363, 1367-68 (10th Cir. 1998). Scope "is generally defined by its expressed object," and "is limited by the breadth of the consent given." *United States v. Elliott*, 107 F.3d 810, 814-15 (10th Cir. 1997) (quotations and citations omitted). Failure to object to a search is an indication the search is within the scope of consent. *See Pena*, 143 F.3d at 1368.

United States v. Park-Swallow, 2002 WL 31538785, *1 (10th Cir. Nov. 14, 2002). Where the expressed purpose of the search is to look for drugs or contraband, "that certainly implies that the officer could look wherever drugs might be hidden." *United States v. Ramstad*, 308 F.3d 1139, 1146-1147, (10th Cir. 2002) citing *Pena*, 143 F.3d at 1367-68.

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[2] Whether omission of this issue from the brief was a mere oversight or an intentional omission by counsel is immaterial at this point.

Defendant contends that he gave limited, rather than general consent to search, in agreeing that Trooper Dean could take a "look." Defendant relies upon *United States v. Wald*, 216 F.3d 1222, 1228 (10th Cir. 2000), where the court found that consent was not general when limited to a "quick look inside the vehicle." The court recognized the general proposition that a defendant's "failure to object when the search exceeds what he later claims was a more limited consent [] is an indication the search was within the scope of consent," (citation omitted), but found that rule to apply only when the defendant initially gave a general authorization to search. Id. There, the court found no consent despite defendant's failure to object to the officer's search of the trunk, as the limited consent to take a "quick look inside" the passenger compartment did not encompass a prolonged look inside the trunk.

In *United States v. Pena*, 920 F.2d 1509 (10th Cir. 1990), *cert. denied*, 501 U.S. 1297 (1991), the Tenth Circuit rejected an argument strikingly similar to that made by this defendant, where the scope of consent for an officer to "look" inside a car was allegedly exceeded by the officer's use of a screwdriver to remove the rear panel of the vehicle. The Tenth Circuit stated that it would not "attach an unduly restrictive meaning to the officer's request to 'look' inside the vehicle,' and concluded that the "search was conducted within the general scope of the permission granted." 920 F.2d at 1515.

Similarly, in *Hooper*, 47 Fed. Appx. At 534, the defendant told the officer that he could "go ahead and look" after the officer asked if he could "look inside the vehicle." While conducting his search of the van, the officer noticed that the plastic molding from the floor and the rear quarter panel did not seem to fit together properly, so he removed the ashtray from the molding and saw a package which contained illegal drugs. The Tenth Circuit rejected defendant's assertion that the officer's removal of the

ashtray was beyond the scope of his consent to "look inside the vehicle," applying the court's reasoning in *Pena*. Accordingly, the court finds no support in the governing authorities for the defendant's assertion that his consent for Trooper Dean to "take a look" was limited, rather than general.

Defendant additionally cites cases involving destruction of property or invasion into locked compartments, apparently because of Trooper Jimerson's removal of rubber molding and movement of the rear side panels which concealed the controlled substances. See *United States v. Osage*, 235 F.3d 518, 2000 CJ C.A.R. 6671 (10th Cir.Dec 15, 2000) (defendant's failure to object to a search of a sealed can did not permit the officer to "destroy the can or render it completely useless for its intended function."); Florida v. Jimeno, 500 U.S. 248, 252 (1991)("It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk..."); United States v. Strickland, 902 F.2d 937 (11th Cir. 1990)(defendant's consent to search of entire vehicle did not include permission to slash a spare tire to investigate its contents). Such cases from other jurisdictions are not persuasive, as no destruction of property or invasion into locked compartments has been shown.

Defendant fails to recognize that under Tenth Circuit law, partial disassembly of property may be justifiable when, as her, general consent is given and no subsequent objection to the search is made.

[Tenth Circuit] case law recognizes permission to search contemplates a thorough search. *United States v. Torres*, 663 F.2d 1019, 1027 (10th Cir. 1981). Specifically, we have recently held officers with consent to search may search the entire vehicle if the suspect "does not

limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent." *United States v. Bustillos-Munoz*, 235 F.3d 505, 515 n. 5 (10th Cir.2000). We have also upheld general consent searches that partially disassembled vehicles when the defendant did not object. *See United States v. McRae*, 81 F.3d 1528, 1537-38 (10th Cir. 1996)(removing trunk carpeting); *United States v. Santurio*, 29 F.3d 550, 553 (10th Cir. 1994)(unscrewing strip holding down interior carpet and removing carpet); *United States v. Pena*, 920 F.2d 1509, 1515 (10th Cir. 1990)(removing rear quarter panel vent and cardboard found beneath); *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986)(removing back seat).

United States v. Felix, 12 Fed. Appx. 827, 831, 2001 WL 629622, *3 (10th Cir. June 7, 2001).

The court finds that defendant gave general consent for the trooper to search his vehicle, that the defendant never objected to the duration or scope of the search, that his consent was reasonably interpreted by the officer to give consent to proceed as he did, *See Ramstad*, 308 F.3d at 1147, and that the scope of the search did not exceed the consent given by the defendant.

Because the law is clear and the court has no hesitation in finding the defendant freely consented to the search conducted, the court declines to address the government's alternative theory that the search of the vehicle was justified based upon probable cause. See Ross, 456 U.S. at 817-19, 823; Carroll v. United States, 267 U.S. 132, 136, 172-73 (1925)(search may include some injury to vehicle or items therein if the damage is reasonably necessary to gain access to a specific location where the officers have probable cause to believe that the object of their search is located.)

IT IS THEREFORE ORDERED that the defendant's motion to suppress evidence (Dk. 18) is denied.

Dated this 19th day of December, 2002, Topeka, Kansas.

"S/ Sam A. Crow, U.S. District Senior Judge"

FILED
United States Court of Appeals
Tenth Circuit

DEC 6 2004

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO ROMAN-ROMAN,

Defendant-Appellant.

No. 03-3276
(D.C. No. 02-CR-401327-01-SAC)
(D. Kan.)

ORDER AND JUDGMENT*[3]

Before SEYMOUR, PORFILIO and MURPHY, Circuit Judges

Alfredo Roman-Roman entered a conditional plea of guilty to one count of conspiracy to possess with intent to distribute methamphetamine, preserving the right to appeal the district court's denial of his motion to suppress evidence obtained from a search of his rented vehicle after a traffic stop. We affirm.

The district court found the following facts. Kansas State Trooper Andrew Dean was on routine patrol on Interstate 70 in Kansas when he stopped a mini-van for a traffic violation. He advised the driver, Ms. Florez, of the purpose of the stop and asked for relevant documentation. Trooper Dean returned to his car, where he obtained criminal history reports and prepared a warning citation. He then returned to the mini-van and asked the occupants why they were taking I-70 from Los Angeles to Alabama, rather than I-40, a more direct route. Ms. Florez translated the question to Mr. Roman-Roman, the passenger, because he previously had been driving the min-van. Mr. Roman-Roman responded that this was the route "they" had told him to take. Trooper Dean returned the documentation to the occupants, gave them a warning citation, and stated;

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*This order and judgment is not binding precedent, except under the doctrines f law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

"Well, you guys are free to go, thanks for your time, O.K.?" Aplt. App. At 47.

The trooper immediately continued; "Do you mind if I ask you a couple more questions, though, before you get going?" *Id.* Ms. Florez replied that she did not, prompting Trooper Dean to query: "You guys don't have any drugs or guns or anything in the car, do you?" *Id.* Ms. Florez replied negatively, to which Trooper Dean said: "Do you mind if we take a look?" *Id.* Both occupants indicated their consent to the search and, pursuant to the trooper's request, stepped out of the vehicle. During the search, approximately sixty-nine pounds of methamphetamine was found wrapped in cellophane bundles and hidden in the wall panels of the mini-van.

After an evidentiary hearing on the motion to suppress, the district court held that Mr. Roman-Roman was not illegally detained, the search followed a valid consent, and the scope of the search did not exceed that consent. Mr. Roman-Roman contests each of these conclusions on appeal, arguing in particular that he does not speak or understand English and therefore did not know he was free to leave and could not have consented to the search. When reviewing the denial of a motion to suppress, "we view the evidence in the light most favorable to the government, accept the district court's findings of fact unless clearly erroneous," and review *de novo* the ultimate determination of reasonableness under the Fourth Amendment. *United States v. Marquez*, 337 F.3d 1203, 1207 (10th Cir. 2003).

The Fourth Amendment protects against unreasonable searches and seizures. A traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. *United States v. Walker*, 933 F.2d 812, 815 (10th Cir. 1991). Such a stop "is valid under the Fourth Amendment if the stop is based on an observed traffic

violation...." *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995). Mr. Roman-Roman does not contend the traffic stop itself was illegal.

After requesting relevant documentation, running a computer check, and issuing a citation, an officer must allow the driver to proceed without further delay or questioning unless "during the course of the traffic stop the officer acquires an objectively reasonable and articulable suspicion that the driver is engaged in illegal activity" or "the driver voluntarily consents to the officer's additional questioning." *United States v. Sandoval*, 29 F.3d 537, 540 (10th Cir. 1994). An encounter can only become consensual under this latter exception after the officer has the returned the driver's documents. United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir. 1994).

In this case, the district court found that Trooper Dean had obtained consent from the occupants to question them further. The trooper first told Ms. Florez and Mr. Roman-Roman that they were "free to go." Aplt. App. At 47. The district court noted that the trooper's follow up question, "Do you mind if I ask you a couple more questions," reemphasized his previous statement that Ms. Florez and Mr. Roman-Roman were indeed free to terminate the encounter. *Id.* At 52. It is undisputed that the documentation in the possession of the trooper was returned to the occupants before the questioning or the delay the Mr. Roman-Roman challenges occurred.

When a defendant alleges he did not voluntarily consent to additional questioning or to a search, the government bears the burden of proving that consent was in fact voluntary. *United States v. Sanchez-Valderuten*, 11 F.3d 985, 990 (10th Cir. 1993). Whether consent is freely and voluntarily given is a question of fact determined from the totality of the circumstances. *United States v. Pena*, 143 F.3d 1363, 1366 (10th Cir. 1998). The government must show the

consent was unequivocal, specific, and freely given without duress or coercion. *United States v. Angulo-Fermandez*, 53 F.3d 1177, 1180 (10th Cir. 1995).

The district court found there was no coercion on the part of Trooper Dean at any time during the encounter. Aplt. App. At 52. The trooper presented a simple query: "You guys don't have any drugs or guns or anything in the car, do you," to which Ms. Florez replied negatively. The trooper then asked "Do you mind if we take a look?" and both occupants indicated their consent to the request. Based on the totality of the circumstances, the district court held there was no factual basis for finding that Mr. Roman-Roman was illegally detained, and further found that he had consented to the search. *Id.* At 52, 57-58.

Mr. Roman-Roman claims he did not understand the English language sufficiently to give valid consent to further questioning or to the search of the vehicle. However, the transcript of the suppression hearing makes clear the Mr. Roman-Roman did not raise this issue in the district court. *See id.* At 125-146. "Having failed to bring this issue to the attention of the district court at the appropriate time, the defendant may not now complain that the court failed to make findings on the issue." *United States v. Rascon*, 922 F.2d 584, 588 (10th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991). "We will not consider issues which are raised for the first time on appeal unless a party demonstrates an impediment which prevented raising the argument below." *United States v. Dewitt*, 946 F.2d 1497, 1499 (10th Cir. 1991); *see also United States v. Orr*, 864 F.2d 1505, 1508 (10th Cir. 1988). Mr. Roman-Roman offers no excuse for his failure to raise his ability to understand English in a timely fashion at the suppression hearing; therefore, the argument is waived.[1]

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[1]Moreover, there is evidence in the record that Mr. Roman-Roman understood English. See Aplt. App. At 82-84 (Trooper Andrew Dean testifying it appeared Mr. Roman-

Finally, Mr. Roman-Roman contends that even if he gave consent, the trooper's search of the vehicle exceeded the scope of his consent. He maintains that consenting to the trooper "taking a look" inside the mini-van, does not amount to consent to the physical manipulation of the vehicle itself. The general standard for measuring the scope of consent is based on "objective reasonableness." *Pena*, 143 F.3d at 1367-68. Scope "is generally defined by its expressed object," and "is limited by the breadth of the consent given." *United States v. Elliott*, 107 F.3d 810, 814-15 (10th Cir. 1997) (quotations and citations omitted). Failure to object to a search is an indication the search is within the scope of consent. *See Pena*, 143 F.3d at 1368.

The district court found that Mr. Roman-Roman "gave general consent for the trooper to search his vehicle,...the defendant never objected to the duration or scope of the search, [and] his consent was reasonably interpreted by the officer...to proceed as he did." Aplt. App. At 57-58. This court has upheld consent searches that resulted in partially disassembling automobiles when the defendant did not object. *United States v. McRae*, 81 F.3d 1528, 1537-38 (10th Cir. 1996)(removing trunk carpeting); United States v. Santurio, 29 F.3d 550, 553 (10th Cir. 1994) (unscrewing strip holding down interior carpet and removing carpet); United States v. Pena, 920 F.2d 1509, 1512, 1515 (10th Cir. 1990)(removing rear quarter panel vent and cardboard found beneath); *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986)(removing back seat). These cases support the district court's conclusion that given the totality of the circumstances here, a typical reasonable person in Mr. Roman-Roman's position would have understood that a general and unrestricted consent to a full search of vehicle included the entire vehicle and every place inside the

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Roman understood English because he responded to questions and instructions given exclusively in English).

vehicle where illegal drugs or contraband could be stored or hidden, unless he subsequently objected thereto. Because the search of the min-van did not exceed the scope of Mr. Roman-Roman's voluntary consent, the district court properly denied his motion to suppress the evidence.

We **AFFIRM**.

ENTERED FOR THE COURT

Stephanie K. Seymour
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

No. 03-3276

ALFREDO ROMAN-ROMAN, (D.C. No. 02-CR-40127

Defendant-Appellant.

ORDER

Filed January 10, 2005

Before **SEYMOUR, PORFILIO** and **MURPHY**, Circuit Judges.

Appellant's motion to file a petition for rehearing out of time is granted. Appellant's petition for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

By: "s/ K. Fabrizio"
Deputy Clerk

Factual Basis for the Guilty Plea. The parties agree to the facts constituting the offense to which defendant is pleading guilty are as follows:

On October 17, 2002, at approximately 10:20 a.m., Kansas Highway Patrolman Andrew Dean was on routine patrol in Geary County, Kansas. He was patrollling Interstate 70 near mile marker 294. At this time Trooper Dean's attention was drawn to a blue 2002 Chrysler mini-van that was traveling eastbound on I-70. Trooper Dean observed the mini-van pull out into the passing lane in front of another vehicle. He also observed the mini-van fail to maintain a single lane. After observing these violations Trooper Dean stopped the mini-van.

After stopping the mini van Trooper Dean approached the driver. The driver identified herself through her California driver's license as Rosa M. Florez. Trooper Dean advised Ms. Florez of the purpose of the stop. He asked for the registration and insurance of the vehicle. While he was waiting for this Ms. Florez advised him that her and her passenger, Alfredo Roman, were traveling from California to Alabama to visit friends. Mr. Roman was also identified by his California driver's license. He was apparently unable to speak English. The rental agreement indicated that the mini-van had been rented in Los Angeles, California by Alfredo-Roman on October 15, 2002. While speaking with Ms. Florez Trooper Dean noticed that she appeared to be unusually nervous. Also in the vehicle were two small children. Trooper Dean also found ti odd that I-70 was used to their route to Alabama versus I-40, which is a more direct route.

After reviewing the documents and preparing the warning citation Trooper Dean returned to the van. He asked them why they had taken I-70 as opposed to I-40. Ms. Florez replied that Mr. Roman had been driving. Ms.

Florez then translated the question to Mr. Roman. He replied that this was the road they told him to take. Trooper Dean then provided them with a warning citation and advised them that they were free to go. Prior to them departing Trooper Dean asked Ms. Florez if they would mind answering a few questions. Ms. Florez replied to the effect that she did not. He then asked them if they were carrying anything illegal such as drugs or weapons or large amounts of cash. Ms. Florez replied to the effect that there was nothing of that nature in the van. At that time Trooper Dean requested consent to search the van. Ms. Florez looked at Mr. Roman and they both nodded their heads in assent. Trooper Dean asked them if they would step out of the vehicle. They complied. During the subsequent search Trooper Dean found approximately 69 pound of methamphetamine in the rear interior panels of the mini-van.

The defendant was later questioned by law enforcement officers and admitted to deliver for distribution the methamphetamine found in his possession.

LAW ENFORCEMENT AFFIDAVIT/NARRATIVE

Case Number	Victim	Offense	Date
2002-012597	State of Kansas	Poss. Meth/Intent	10-17-2002

For [x] PC arrest/detention

[ ] Warrant Request

Suspect name: Alfredo Roman-Roman

COMES NOW, Trooper A. Dean, Kansas Highway Patrol Trooper, being of lawful age and having been sworn on oath and hereby states and alleges that in the said county of Geary and said state of Kansas, he has been informed of the following:

On 10/17/2002 at approximately 10:20 hours, 2Lt. Richard Jimerson and I (Trooper Andrew Dean) were patrolling Eastbound on I-70, in the area of milepost 295. We conducted a traffic stop on a Blue 2002 Chrysler Minivan in the area of milepost 296. We subsequently arrested the driver, Rosa M. Florez, and passenger, Alfredo Ramon-Ramon, for transporting approximately 60 Lbs. of a Yellow powder wrapped in cellophane. The powder was later identified as being methamphetamine.

VEHICLE IN MOTION:

While traveling Eastbound on I-70, we observed unit#1, a Blue 2002 Chrysler Town & Country Minivan, displaying California Registration 4XBY404, commit the following:

*Unit#1 was traveling in the left lane.

*When making a lane change into the right lane, unit #1 pulled in front of a Maroon Buick within 2-3 car lengths. The Buick was also traveling Eastbound in the right lane.

*We also observed the right side tires of unit#1 touch the white line located along the South side shoulder of the Eastbound lanes.

*We conducted a traffic stop on the vehicle in the area of milepost 296.

PERSONAL CONTACT

*I approached unit#1 on the passenger side.

*I made contact with the driver and explained the reason for the stop.

*The driver identified herself by California Driver's license as Rosa M. Florez D.O.B. 5/22/1979. (DL#B8759008)

*She stated they were coming from the Los Angeles area and traveling to Cullman, Alabama.

*Flores provided me with a rental agreement, which indicated that the vehicle had been rented in Burbank, California to Ramon-Ramon on 09/22/2002.

*They stated that they were going to Cullman, Alabama to see a friend.

*There were two small children, ages 2 and 4, sitting in the seat located behind the two front seats.

*While speaking with the occupants in the vehicle I could see the following:

-A small white TV sitting on a cardboard box.

-Two Spanish Bibles and a video camera sitting on the dashboard of the vehicle.

- Air freshener spray

- Misc. Clothes

- Fast food cups

- A CD Player wired to the factor stereo.

*I issued a warning to Flores for making an unsafe lane change and failing to maintain a single lane of traffic.

*I asked Flores why she took the I-70 when she could have saved time by taking the I-40.

*Flores looked to Ramon and stated that he had been driving.

*I had Flores repeat the question to Ramon.

*Speaking in Spanish, he explained to Flores that I-70 was the road that they told him to take.

*I advised Flores that she was free to go and thanked her for her time.

*I then asked Flores if I could ask a few questions and she stated yes. I asked if there were any drugs, guns or large amounts of cash in the vehicle and she stated no. I then asked if I could take a look in the vehicle. Flores looked to Ramon and they nodded their heads in agreement.

Flores softly stated sure and I explained that I would have Ramon step out of the vehicle first.

CONSENTUAL SEARCH

*Lt. Jimerson and I observed the following

-A plastic container in the rear of the minivan that was full of dried shrimp. There were two additional trash bags full of shrimp.

-Misc. blankets and clothes

-Two duffel bags containing misc. clothes

-Diapers

-A cooler between the two front seats.

-An atlas

*Lt. Jimerson located an area in the rear of the vehicle where the rubber seal had been tampered with.

*When removing a plastic panel from the right rear side of the vehicle, Lt. Jimerson could see small bundles of colored cellophane packed in the walls of the vehicle.

*Both subjects were taken into custody at 10:37 hours and read Miranda at 10:55 hours.

POST-ARREST

*Flores drove the van to The Junction City Police Department where 60 Lbs. of Methamphetamine was located on both sides of the van.

WHEREFORE, Affiant believes probable cause exists that***suspects name, DOB, HT/WT, Hair/Eyes, Aliases**has committed the offense(s) of **list offenses**.

FURTHER AFFIANT SAITH NAUGHT.

"s/ Andrew Dean"
Affiant

Subscribed and sworn to before me this 18 day of October 2002.

"s/ Martin Snyder"
Notary Public

Supreme Court, U.S.
FILED
SEP 6 - 2005
OFFICE OF THE CLERK

(2)

No. 04-1467

In the Supreme Court of the United States

ALFREDO ROMAN-ROMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
KIRBY A. HELLER
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Department of Justice
Washington, D.C. 20530-0001
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QUESTIONS PRESENTED

1. Whether the court of appeals was required to consider petitioner's claim, not raised in the district court, that he did not voluntarily consent to the search of his vehicle because he did not understand English.

2. Whether petitioner was unlawfully detained following a traffic stop after the state trooper returned travel documents to him and the driver, told them that they were free to leave, and then asked if they would answer some additional questions.

3. Whether state troopers exceeded the scope of petitioner's and the driver's consent to search when they removed loose molding and a side panel on the inside of the car.

4. Whether, in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005), the district court erred by enhancing petitioner's sentence under a mandatory application of the Sentencing Guidelines, based on facts that were not specifically found by the jury.

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In the Supreme Court of the United States

No. 04-1467

ALFREDO ROMAN-ROMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-32) is not published in the *Federal Reporter* but is available at 116 Fed. Appx. 994. The opinion of the district court (Pet. App. 14-25) is not reported in the *Federal Supplement* but is available at 2002 WL 31928487.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2004. A petition for rehearing was denied on January 10, 2005. The petition for a writ of certiorari was filed on April 11, 2005 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of conspiring to possess in excess of 30 kilograms or more of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 135 months of imprisonment, to be followed by five years of supervised release. 8/23/03 Judgment 1-3. The court of appeals affirmed. Pet. App. 26-32.

1. On October 17, 2002, while on routine patrol duty, Kansas State Trooper Andrew Dean stopped a minivan after observing a traffic violation. Trooper Dean approached the driver, Rosa Florez, and asked for her relevant documentation. Florez complied. She explained that the minivan was rented and that she and petitioner were driving from California to Alabama to visit friends. According to the rental agreement, petitioner had rented the minivan two days earlier. Although petitioner appeared to understand some English, Florez told Trooper Dean that petitioner did not speak it. Both occupants appeared nervous. Pet. App. 15-16, 30 n.1.

Trooper Dean reviewed the documentation and criminal history reports and prepared a warning citation. He then returned to the minivan, questioned Florez further about their travel plans and route, returned the documentation, and issued the warning citation. Pet. App. 16. At the conclusion of the traffic stop, he stated to Florez and petitioner: "Well you guys are free to go—thanks for your time, O.K." *Ibid.* Trooper Dean then asked whether they minded if he asked a few more questions before they left, to which Florez responded that she did not. In response to Trooper Dean's question, Florez stated that there were no guns or drugs in the car. Trooper Dean then asked, "Do

you mind if we take a look?" Petitioner and Florez looked at each other and nodded their heads in assent. *Id.* at 16, 36.

The troopers asked petitioner, Florez, and the two children who were traveling in the back seat to step out of the minivan, and the troopers began their search. Petitioner never objected to the search. Trooper Richard Jimerson noticed that the molding near the roof line was "curled up," indicating that it had been recently removed. Because the vehicle was brand new and a rental, Trooper Jimerson believed, based on his experience, that the molding had been removed to secrete contraband. He removed the loose molding, pulled the back side panels out, and found approximately 69 pounds of methamphetamine hidden in the wall panels of the minivan. Gov't C.A. Br. 3-4.

2. Petitioner moved to suppress the drugs. As the sole ground for suppression, he argued that he was unlawfully detained because the trooper continued to interrogate him and Florez after informing them that they were free to leave, and because their consent was not "sufficiently attenuated" from the unlawful detention. Pet. C.A. App. 33. Before the evidentiary hearing began, petitioner claimed, for the first time, that the troopers' search of the vehicle exceeded the scope of the consent to search. *Id.* at 53, 63. At the hearing, Troopers Dean and Jimerson testified to the facts described above. As to petitioner's ability to speak and understand English, Trooper Dean testified that, in response to his request to petitioner for his license, petitioner had said "sure," and handed the license to the trooper. *Id.* at 75. In light of that exchange, Trooper Dean inferred that petitioner understood some English. *Id.* at 83-84. Trooper Dean also noted that, in response to his request for their consent to search the minivan, Florez and petitioner looked at each; she said something softly in Span-

ish to him; and they shook their heads in agreement. *Id.* at 84. Trooper Dean was not cross-examined about petitioner's English-speaking ability.

The district court denied petitioner's motion to suppress. It found that, once Trooper Dean returned all the documents and told petitioner and Florez that they were free to leave, the further encounter between petitioner and Trooper Dean was consensual. Because petitioner had objected to the consent search solely on the ground that it was the fruit of an unlawful detention, the district court did not further analyze the voluntariness of the consent and rejected his challenge to the search. Pet. App. 20. The district court also found that the troopers reasonably interpreted petitioner's general consent to search and his failure to limit the search by objecting during its execution as authorizing them to remove the molding in the minivan. *Id.* at 21, 24.

Petitioner subsequently entered a conditional plea of guilty to conspiring to possess in excess of 30 kilograms or more of methamphetamine with the intent to distribute it, reserving the right to appeal "the search and seizure issue litigated in the district court." Pet. C.A. App. 167.

3. The court of appeals affirmed in an unpublished order. The court declined to consider petitioner's argument, raised for the first time on appeal, that he did not sufficiently understand English to validly consent to further questioning or to the search, because he did not raise that contention below. As to the scope of the search, the court held that under the totality of the circumstances, a reasonable individual in petitioner's circumstances would have understood that a general consent to search authorized a full search of the entire minivan and "every place inside the vehicle where illegal drugs or contraband could be stored or hidden." Pet. App. 31-32.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the court of appeals was required to consider his claim that his inability to speak English prevented him from voluntarily consenting to the search of the minivan despite the fact that he did not raise that claim in the district court. This case does not implicate a conflict in the federal courts of appeals or raise an important question of federal law. For that reason and because the result in this case does not depend in any event on whether petitioner understood English, further review by this Court is not warranted.

a. The courts of appeals have generally agreed that a new theory of suppression may not be raised for the first time on appeal. See, *e.g.*, *United States* v. *Luciano*, 329 F.3d 1, 9 (1st Cir. 2003) (court would not consider new argument not made in district court in support of motion to suppress); *United States* v. *Yousef*, 327 F.3d 56, 126 (2d Cir.) (defendant waived coercion argument not raised in district court), cert. denied, 540 U.S. 933 (2003); *United States* v. *Quintanilla*, 218 F.3d 674, 678 (7th Cir. 2000) (new claim not included in motion to suppress is reviewed for cause, which is more stringent standard than plain error); *United States* v. *Wright*, 215 F.3d 1020, 1026 (9th Cir.) ("just as a failure to file a timely motion to suppress evidence constitutes a waiver, so too does a failure to raise a particular ground in support of a motion to suppress") (internal quotation marks and citation omitted), cert. denied, 531 U.S. 969 (2000); *United States* v. *Woodall*, 938 F.2d 834, 836 (8th Cir. 1991) (because specific suppression issue was not raised before the district court, defendant cannot raise it on appeal).

In this case, petitioner did not challenge the voluntariness of his consent to the search below other than to con-

tend that it was the fruit of an unlawful detention. For that reason, the district court made no findings on petitioner's ability to understand English or the effect of that factor on his consent. Because his theory on appeal was never presented to the district court, the court of appeals correctly held that he waived the issue.

Petitioner's claim that the court of appeals should have considered his new argument is especially unavailing, where, as here, he has pleaded guilty and his plea agreement limited the issue preserved for appeal. See, *e.g.*, *United States* v. *Anderson*, 374 F.3d 955, 957-958 (10th Cir. 2004) (new theory of suppression raised for the first time on appeal was not properly preserved by conditional plea agreement); *United States* v. *Doherty*, 17 F.3d 1056, 1058 (7th Cir. 1994) (appeal fell outside scope of appellate right defined by plea agreement because defendant challenged indictment on grounds not raised in district court); *United States* v. *Ramos*, 961 F.2d 1003, 1005-1006 (1st Cir.) (a defendant "conditionally preserves for appellate review only the district court's adverse rulings on specified pretrial motions"), cert. denied, 506 U.S. 934 (1992). Because petitioner's conditional plea agreement specifically limited his appeal to "the search and seizure issue litigated in the district court," the issue of his ability to speak English was not properly preserved.

b. Petitioner contends (Pet. 6-7) that the court of appeals' decision conflicts with this Court's decisions in *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), and *Brown* v. *Mississippi*, 297 U.S. 278 (1936). That contention is mistaken.

Blackburn involved petitioner's challenge to the admission of his confession based upon his claim that he was mentally ill at the time that he committed the crime and confessed. Based on nearly uncontradicted evidence in the

record, the Court held that the confession was involuntary, and stated, in dicta, that it was not limited only to considering evidence introduced before the admission of the confession. That case, which was premised on a due process violation, provides no authority for the proposition that a defendant may raise a new theory for suppression for the first time on appeal. *Brown* similarly involved the issue of whether a conviction based solely on a confession induced by torture violated due process.

c. In any event, the evidence in this case was lawfully seized. Even if petitioner did not understand Trooper Dean's questions, the record plainly demonstrated that Florez did. The police may obtain consent from a third party who possesses common authority over the area or item to be searched. *United States* v. *Matlock*, 415 U.S. 164 (1974). In addition, third-party consent is effective if the police reasonably believe that the third party had common authority over the area to be searched. *Illinois* v. *Rodriguez*, 497 U.S. 181 (1990).

Applying these principles, the courts of appeals have repeatedly held that the driver of a car has apparent authority to consent to a search of the vehicle. See, *e.g.*, *United States* v. *Crain*, 33 F.3d 480, 484 (5th Cir. 1994) ("A person who has joint control over an automobile may give valid consent to its search."), cert. denied, 513 U.S. 1169 (1995); *United States* v. *Eldridge*, 984 F.2d 943, 948 (8th Cir. 1993) (driver of vehicle has authority to consent to full search of vehicle); *United States* v. *Garcia*, 897 F.2d 1413, 1419 (7th Cir. 1990) (same); *United States* v. *Morales*, 861 F.2d 396, 399 (3d Cir. 1988) (driver of vehicle, rented in passenger's name, has authority to consent to search of vehicle). The troopers therefore reasonably relied on Florez's consent to search the minivan. For the same reason, even if petitioner did not understand that he was free to leave

after Trooper Dean returned the documents and issued the warning, Florez willingly engaged in a consensual encounter with the troopers and the search was the result of her consent.

Finally, while petitioner may have been unable to speak English, there was evidence in the record that he understood it. See Pet. App. 30 n.1. Not only did he appropriately respond to Trooper Dean's request for his driver's license, but he also nodded his head in assent after Trooper Dean asked for permission to search the car.

2. Petitioner next contends (Pet. 9-11) that he was unlawfully detained after Trooper Dean returned the documentation and warning citation to Florez. Petitioner's claim in the court of appeals was primarily limited to whether, in light of his inability to speak English, he understood that he was free to leave. Pet. C.A. Br. 11. For that reason, the court of appeals did not review the district court's finding that petitioner was not unlawfully detained. Review by this Court under those circumstances is unwarranted. Cf. *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (this Court "generally do[es] not address arguments that were not the basis for the decision below").

In any event, petitioner's fact-bound challenge to the stop is without merit. As this Court has explained, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), the encounter is consensual and no reasonable suspicion is required." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991). The test the Court has developed to distinguish seizures from consensual encounters is whether, "in view of all of the circumstances surrounding the inci-

dent, a reasonable person would have believed that he was not free to leave." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). The police are not required to inform the vehicle's occupants that they are free to leave before seeking their consent, *Ohio* v. *Robinette*, 519 U.S. 33, 35, 40 (1996), although in this case Trooper Dean did precisely that.

The district court correctly concluded that Trooper Dean's statements made clear that petitioner and Florez were free to leave after he returned their documents to them. Moreover, the record contained no evidence of coercion. In those circumstances, the encounter was consensual and the consent was not the product of an unlawful detention.

3. Petitioner also contends (Pet. 11-12) that this Court's review is necessary to settle the question whether the scope of a general consent to search encompasses removing molding and paneling from a vehicle. Petitioner's arguments lack merit and involve only the application of well-established legal principles to the particular facts of this case.

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness." *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) (internal quotation marks and citations omitted). The proper question is "what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Ibid.* It is generally reasonable for police officers to conclude that a motorist's general consent to search his car includes all areas that might contain drugs when the officers have told the motorist that they are looking for drugs. *Id.* at 251-252.

Courts of appeals have approved searches in which a motorist consents generally to the search and the police remove, without destroying, components of the vehicle. See, *e.g.*, *United States* v. *Zapata*, 180 F.3d 1237, 1243 (11th Cir. 1999) (holding that the search of a vehicle's interior door panel was within the scope of the defendant's general consent to search for narcotics, weapons, or money because the door panel could contain such items); *United States* v. *Flores*, 63 F.3d 1342, 1362 (5th Cir. 1995) (unscrewing two screws and removing two vent covers from the interior panels was within scope of general consent), cert. denied, 519 U.S. 825 (1996); *United States* v. *Martel-Martines*, 988 F.2d 855, 858 n.3 (8th Cir. 1993) (using screwdriver to puncture small hole in metal compartment hidden underneath truck bed in order to remove it was reasonable); but see *United States* v. *Garcia*, 897 F.2d 1413, 1419-1420 (7th Cir. 1990) (opening door panels exceeded scope of consent, but evidence not suppressed because officers had probable cause to search).*

The Tenth Circuit correctly determined that the search in this case fell within the scope of Florez's consent. Trooper Dean first asked Florez whether there were drugs or guns in the car, and then obtained her consent to search the car. It was therefore reasonable for the officers to search all areas in which drugs could be hidden. See *Zapata*, 180 F.3d at 1243 ("Numerous cases in our sister circuits demonstrate that money and drugs are frequently

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* Petitioner also cites (Pet. 11) *United States* v. *Strickland*, 902 F.2d 937 (11th Cir. 1990), to support his position that the police may not destroy property during a general consent search. Because property was not destroyed in the case below, *Strickland* is inapposite. The Eleventh Circuit distinguished *Strickland* in *Zapata*, 180 F.3d at 1243, in which the court upheld the opening of a secured compartment in a car that did not damage the interior door panel.

stored behind interior panels in an automobile."). Although the Seventh Circuit found to the contrary, *Garcia*, 897 F.2d at 1419, its observation that police may not reasonably expect to find drugs behind door panels is belied by the experience of law enforcement officers referenced in cases from other circuits. Indeed, cases originating in the Seventh Circuit confirm the same point. See *Ornelas* v. *United States*, 517 U.S. 690, 692-693 (1996) (describing officer's discovery in Milwaukee of two kilograms of cocaine hidden behind a door panel in an older model General Motors car of the type that is "a favorite of drug couriers because it is easy to hide things in them").

Petitioner also contends (Pet. 11-12) that this Court should consider whether a motorist's inability to observe the actions of the police during the search constitutes a Fourth Amendment violation. This case does not present the proper vehicle to resolve that question because petitioner did not press that issue below and the district court made no factual finding on whether either petitioner or Florez could view the search from their vantage points.

4. Lastly, petitioner argues for the first time in this Court (Pet. 12-13) that his sentence should be vacated because the district court sentenced him in violation of *United States* v. *Booker*, 125 S. Ct. 738 (2005). In *Booker*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 542 U.S. 296 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant the writ of certiorari, vacate the judgment of the court of

appeals, and remand the case for further consideration in light of *Booker*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error. See *id.* at 769.

CONCLUSION

On the fourth question presented, the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005